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No. 91-339

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WALTER LEE, Superintendent of Port Authority Police,

Cross-Petitioner,

vs.

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., and BRIAN RUMBAUGH,

Cross-Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CROSS-PETITION FOR A WRIT OF CERTIORARI

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On the Cross-Petition:
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QUESTIONS PRESENTED

The Port Authority of New York and New Jersey, the agency that operates the three major New York Metropolitan area airports, restricts the repetitive distribution of literature and solicitation of contributions to the exterior portions of the airports' terminal buildings. The restriction is imposed as a means of promoting the safe and convenient use of those buildings by air travelers and other visitors. In a suit brought by the International Society for Krishna Consciousness, Inc. ("ISKCON"), and a member thereof, the United States District Court for the Southern District of New York held that the airport terminals were public fora, and granted plaintiffs summary judgment declaring the restrictions to be in violation of the First Amendment. In a partial reversal of the District Court judgment, the United States Court of Appeals for the Second Circuit held that the airport terminals were not public fora, and reversed the portion of the judgment below declaring the restriction on solicitation to the exterior of those buildings to be unconstitutional. The Court of Appeals, however, did not disturb the District Court's judgment invalidating the restriction on the distribution of literature, although neither court held that the restriction was not a reasonable means of serving the legitimate interests of the Port Authority as operator of the airport.

Plaintiffs have filed a Petition for a Writ of Certiorari with respect to the Second Circuit's reversal of the District Court judgment declaring the restriction on solicitation to be unconstitutional. By this Cross-Petition for a Writ of Certiorari, the respondent to plaintiffs' petition seeks a writ of certiorari with respect to the Second Circuit's affirmance of the District Court judgment invalidating the restriction on the distribution of literature.

This Cross-Petition presents the following questions:

1. Is a government agency that operates a nonpublic forum required to permit the repetitive distribution of literature in that forum in the absence of a determination that the restriction is not a reasonable method of serving the legitimate interest of the agency as operator of the forum?

2. Is a restriction on the repetitive distribution of literature to the exterior portions of an airport terminal building, which serves thousands of airline passengers and other air travel-related visitors each day, a reasonable means of serving the airport operator's interest in promoting the safe and convenient use of the airport?

LIST OF PARTIES

Cross-Petitioner Walter Lee was Superintendent of the Port Authority Police when this action was commenced. The Superintendent of Port Authority Police is an employee of The Port Authority of New York and New Jersey ("the Port Authority"). The Port Authority is a bi-State agency created in 1921 by a Congressionally-consented-to Compact to develop interstate public transportation, terminal, and other facilities of commerce within the statutorily defined Port District. 42 U.S. Stat. 174 (1921), consenting to 1921 N.J. Laws, Ch. 151 and 1921 N.Y. Laws, Ch. 154. The Compact is codified at N.Y. Unconsol. Laws §§6401-23 (McKinney 1979); N.J. Stat. Ann. §§32:1-1 to -24 (West 1963). Pursuant to the Compact, and subsequently enacted bi-State legislation supplemental thereto, the Port Authority owns and operates thirty-seven public facilities in the Port District including the three major New York Metropolitan area airports — John F. Kennedy International Airport, LaGuardia Airport and Newark International Airport. The Port Authority has no subsidiaries other than the Port Authority Trans-Hudson Corporation,

a wholly-owned subsidiary which owns and operates the PATH railroad line between New York and New Jersey.

Cross-Respondent International Society for Krishna Consciousness, Inc. ("ISKCON") is organized as a not-for-profit religious organization. Cross-Respondent Brian Rumbaugh is a member of ISKCON.

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CROSS-PETITION FOR A WRIT OF CERTIORARI

Cross-petitioner Walter Lee respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered February 8, 1991 insofar as such judgment affirmed the judgment of the United States District Court of the Southern District of New York.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix to Petition for Writ of Certiorari, at 1-28) is reported at 925 F.2d 576 (2d Cir. 1991). The opinion of the District Court (Appendix to Petition for Writ of Certiorari, at 30-48) is reported at 721 F. Supp. 572 (S.D.N.Y. 1989).

JURISDICTION

The judgment of the Court of Appeals was entered on February 8, 1991. A Petition for Rehearing with Suggestion for Rehearing En Banc was timely filed, and was denied on April 25, 1991. The Petition for Certiorari was received on July 26, 1991.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U.S. Const. amends. I and XIV.

Airport Rules and Regulations, The Port Authority of New York and New Jersey, Chapter III, as amended by resolution dated February 11, 1988, provides in pertinent part as follows:

> "B. Non-commercial activity at Port Authority air terminals which are not occupied by a lessee, licensee or permittee is subject to the following conditions and restrictions:
>
> 1. The following conduct is prohibited within the interior areas of buildings or structures at an

> air terminal if conducted by a person to or with passers-by in a continuous or repetitive manner:
>
> . . .
>
> (b) The sale or distribution of flyers, brochures, pamphlets, books or any other printed or written material.
>
> (c) The solicitation and receipt of funds.
>
> . . . "

STATEMENT OF THE CASE

(A)

Cross-respondents, plaintiffs below, are the International Society for Krishna Consciousness, Inc. ("ISKCON") and a member thereof.[1] ISKCON members perform a practice known as *sankirtan*, which consists of "'going into public places, disseminating religious literature and soliciting funds to support the religion.'" (A 3, 31).[2] The primary purpose of the activity appears to be fund-raising (A 3). Plaintiffs instituted the suit at bar to challenge regulations whose effect was to restrict the practice of *sankirtan* at the three major airports serving the New York City metropolitan area, John F. Kennedy International Airport ("Kennedy"), LaGuardia Airport ("LaGuardia") and Newark International Airport ("Newark") (A 2, 30).

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[1] Hereinafter, the Cross-Respondents will be referred to as "Plaintiffs".

[2] "A" followed by numerals refers to pages of the Appendix to the Petition for a Writ of Certiorari.

Cross-petitioner Walter Lee was Superintendent of the Port Authority Police when this suit began.[3] The Superintendent is an employee of The Port Authority of New York and New Jersey in command of the police force of the Port Authority. The Port Authority was created in 1921 by a congressionally-consented-to interstate compact between the States of New York and New Jersey to develop public transportation, terminal and other facilities of commerce (A 4, 30).[4] At the present time, the Port Authority owns and/or operates thirty-seven (37) such facilities, including John F. Kennedy International Airport ("Kennedy"), LaGuardia Airport ("LaGuardia") and Newark International Airport ("Newark"). These three airports constitute the busiest and most heavily used airport complex in the world. In 1986, they served approximately 79 million travelers, constituting about eight percent of United States' domestic flights, and over one-half of United States' trans-Atlantic flights. It is estimated that the passenger load of the airports will increase to 110 million by the year 2000 (A 4).

The Port Authority is charged with operating the three airports for the benefit of the people of New York and New Jersey. N.Y. Unconsol. Laws §6634 (McKinney 1979); N.J. Stat. Ann. §32:1-35.4 (West 1963). In accordance with its statutory authority, the Port Authority has leased much of the space in the airports to numerous airlines. Under these leases, the airlines exercise primary control over the leased areas (A 4). The Port Authority retains complete

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[3] Walter Lee no longer holds this position. The caption has not been amended to substitute another named defendant. *See*, Plaintiffs' Petition for a Writ of Certiorari ("Petition") at 3 n.3.

Hereinafter, the Cross-Petitioner will be referred to as "Superintendent".

[4] The Compact is codified at N.Y. Unconsol. Laws §§6401-6423 (McKinney 1979); N.J. Stat. Ann. §§32:1-1 to -24 (West 1963).

control over unleased areas. This action originally concerned restrictions in all areas of the airport, both leased and unleased. However, over the course of the litigation, Plaintiffs' claims with respect to leased areas were settled,[5] and only the claims with respect to the unleased areas of the Airports within Port Authority control remained for determination by the District Court (A 4, 32).[6]

The Port Authority airports' sole purpose is to facilitate air travel (A 12-13, 43, 44). This purpose is reflected in a variety of airport characteristics: user-fee financing, pedestrian congestion, the existence of captive audiences, physical separation from surrounding communities and special security concerns (A 12-14, 44-47). The air terminals contain facilities which directly and indirectly serve air travelers. The facilities which indirectly serve air travelers are restaurants, snack stands, postal facilities, currency exchange facilities, bookstores and similar facilities (A 5, 40). Although access to these facilities is not restricted, virtually all persons who visit the airports do so for air-travel-related purposes, *i.e.*, for air travel itself, to meet an air traveler or to perform a service for an airline or airport terminal service provider (A 5, 12-13).

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[5] The settlement agreement between the Plaintiffs and the airlines provided, *inter alia*, that plaintiffs would release the airlines from any claim at law or equity arising from the airlines refusal to allow Plaintiffs to distribute literature or solicit contributions in airline terminal space, and that Plaintiffs would enjoy the same access to such space that an unrelated party would be granted by reason of a final judgment in subsequent litigation against the airlines (Joint Appendix, at 319, 320).

[6] Hereinafter, for the sake of brevity, the phrase "air terminals" will refer only to Port Authority controlled areas, the subject of plaintiffs' remaining claims.

The Port Authority has adopted regulations to address the adverse effects of leafleting and solicitation upon the safe, efficient and convenient use of the airports by airline passengers. Pedestrian congestion presents a particularly acute problem at the Port Authority airport terminals. Much of these facilities were built before the introduction of wide-body, high passenger load aircraft; and air travelers, who are often burdened with baggage, and may be hurrying to a plane or ground transportation, are more adversely affected by congestion than pedestrians in other contexts (A 14).

Certain of the Port Authority regulations effectively prohibit the performance of *sankirtan* in the interior portions of the air terminals. These regulations provide in pertinent part as follows:

> "[B. Non-commercial activity at Port Authority air terminals which are not occupied by a lessee, licensee or permittee is subject to the following conditions and restrictions:]
>
> 1. The following conduct is prohibited within the interior areas of buildings or structures at an air terminal if conducted by a person to or with passers-by in a continuous or repetitive manner:
>
> . . .
>
> (b) The sale or distribution of flyers, brochures, pamphlets, books or any other printed or written material.
>
> (c) The solicitation and receipt of funds."[7] (A 6).

[7] Airport Rules and Regulations, The Port Authority of New York and New Jersey, Chapter III, as amended by resolution dated February 11, 1988.

(B)

After preliminary proceedings described in the opinions below, the District Court granted Plaintiffs summary judgment, holding that the Port Authority's regulations prohibiting the continuous and repetitive distribution of literature and solicitation of contributions inside the air terminals violated the United States Constitution based in principal part upon the District Court's determination that the air terminals are public fora (A 47-48).

The District Court determined the standard to be applied to the Port Authority's regulations using this Court's now familiar public forum analysis of *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983) and *Cornelius v. NAACP Legal Defense & Educational Fund*, 473 U.S. 788 (1985):

> "[Under public forum analysis, i]n both traditional and designated public fora, the government may not impose content-based restrictions on First Amendment activity unless those restrictions are narrowly tailored to further a compelling state interest. However, the government may impose in those fora content-neutral time, place and manner restrictions, provided such restrictions serve significant governmental interests and leave adequate alternative channels of communication open. In a non-public forum, by contrast, the government may restrict expression, so long as the restrictions are reasonable and do not discriminate against certain viewpoints." (A38 (citations omitted)).

The District Court noted that "[i]t is now well settled that streets, parks and sidewalks are traditional public fora[,]" (A 38 (brackets in original)) and, that designated public

fora are places "which the 'State has [intentionally] opened for use by the public as a place for expressive activity.' " (A 38 (brackets in original)).

The District Court held that the air terminals were traditional public fora because they possessed the characteristics of a "bustling metropolitan boulevard" (A 40). The court rejected the Superintendent's contention that public streets and parks are unique species of public property and that airports should not be classified with them as traditional public fora (A 41). The court also rejected the Superintendent's argument that the sole purpose of the air terminals as facilitators of air transportation and the attendant characteristics of airport terminals, including their design, financing, planning, conditions of congestion, presence of captive audiences, isolation from surrounding communities and security problems, distinguish airport terminals from city streets. According to the District Court, these characteristics do not take airports out of the traditional public forum classification, and, to the extent that First Amendment activity would interfere with airport operations, such issues should be addressed in time, place and manner restrictions (A 43-47). Accordingly, the District Court granted Plaintiffs' motion for summary judgment (A 48). The Superintendent appealed to the Second Circuit.

(C)

The Court of Appeals reversed the judgment below in part, holding that the Port Authority rules at issue were valid insofar as they prohibited solicitation within the air terminals, but were invalid insofar as they prohibited the distribution of literature within the air terminals. The Court of Appeals' decision was based in large part upon this Court's decision in *United States v. Kokinda*, __ U.S. __, 110 S.Ct. 3115 (1990), which was issued after the case at bar was heard in oral argument. *Kokinda* held that the

Postal Service's prohibition of the solicitation of funds on a walkway outside of a post office was valid.

After reviewing the facts of this case and the public forum doctrine in general (A 1-9), the Court of Appeals began its discussion of the case at bar by considering whether the airport terminals were public fora. The Second Circuit stated that prior to the decision in *Kokinda*, it would have classified the air terminals as public fora because the established authority in other circuits had classified airports as pubic fora, and the court was reluctant to create a conflict when the view of other circuit courts was not unreasonable. However, the court below continued, "*Kokinda*[ ] has altered public forum analysis and . . . we would not be faithful to Supreme Court precedent if we were to follow the other circuits." (A 10-11).

Under the Second Circuit's analysis, *Kokinda* upheld the prohibition of solicitation on the post office walkway based upon two parallel rationales. First, in the plurality opinion written by Justice O'Connor,[8] the prohibition was valid because the walkway was not a public forum since it "was not a public passageway designed 'to facilitate the daily commerce and life of the neighborhood or city' but was intended 'solely to assist postal patrons' to get access to postal services. [110 S.Ct.] at 3123." (A 11). And, second, in the concurring opinion of Justice Kennedy, solicitation was sufficiently disruptive conduct so that it could be prohibited irrespective of whether the walkway were a public forum (A 12).

According to the Court of Appeals, the passageways in the Port Authority's terminals are similar to the walkway in *Kokinda* because both the airport terminals and the post

[8] The plurality opinion written by Justice O'Connor was joined in by the Chief Justice and Justices White and Scalia. *United States v. Kokinda*, __ U.S. __ , 110 S.Ct. 3115, 3117 (1990).

office walkway are intended solely to facilitate a particular class of transactions — air travel in the case of the airport terminal passageways, postal activities in the case of the post office walkways. People do not use the passageways in air terminals to meet friends for lunch, window-shop, take the air, or engage in any of the other purposes for which city streets are used. The passageways are used solely for air-related purposes by travelers, persons connected with air travelers, or employees of businesses serving air travelers (A 12, 13). The similar appearance of the airport passageways and city streets were held to be of no moment in view of the special purpose of the airport (A 13).

Furthermore, the majority stated, the Port Authority's anti-solicitation restriction served precisely the same purpose as the restriction upheld in *Kokinda*. Like the Postal Service in *Kokinda*, the Port Authority has an interest in protecting its airport patrons from the disruption of in-person solicitation (A 13-14). In fact, the Court of Appeals held that solicitation would have a greater disruptive effect in the air terminal than in a post office walkway because of the nature of the air terminals. Specifically, the Second Circuit held that pedestrian congestion is one of the greatest problems of the air terminals because much of the facilities in question were built before wide-body aircraft, and air travelers are often weighted down by cumbersome baggage while hurrying to catch a plane or to arrange ground transportation (A 14).

Although the Court of Appeals upheld the validity of the ban on solicitation, the Court of Appeals reached a different conclusion with respect to the ban on leafleting inside the air terminals. Relying upon Justice Kennedy's characterization of solicitation as a far more disruptive activity than leafleting, the Second Circuit held that the Port Authority's ban on leafleting in the air terminals was not constitutional (A 14-15).

Chief Judge Oakes dissented, stating that in his view the airport terminals were public fora. According to the dissent, *Kokinda* did not announce a new rule under which a site's public forum status was dependent upon the site's purpose (A 17-20). In Chief Judge Oakes' view, a number of factors, especially airport passageways' similarity to public streets, caused the airport terminals' passageways to have the status of public fora (A 21). Chief Judge Oakes agreed with the District Court that those characteristics of the airport terminals' passageways which result from their purpose of facilitating air travel do not warrant their classification as nonpublic fora (A 22-26). The dissenting opinion concluded that the District Court's judgment should be upheld because neither the ban on leafleting nor the ban on solicitation satisfied the requirements for regulation of expressive activity in a public forum (A 27-28).

REASONS FOR GRANTING THE CROSS-PETITION

THE COURT OF APPEALS ERRED BY NOT APPLYING THE "REASONABLENESS" STANDARD TO THE PORT AUTHORITY'S RESTRICTION OF LEAFLETING IN THE NONPUBLIC FORA OF ITS AIRLINE TERMINALS, AS REQUIRED BY *PERRY* AND OTHER PUBLIC FORUM DECISIONS OF THIS COURT

The Court of Appeals correctly applied the public forum doctrine developed by this Court in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) and other cases in holding that the airport terminals are not public fora, and that repetitive solicitation may be prohibited from within their interiors as a reasonable regulation that is viewpoint-neutral. However, the Court of Appeals erred in not judging the similar Port Authority restriction on leafleting by the same standard. This cross-petition

should be granted because the failure of the Court of Appeals to apply the reasonable, viewpoint-neutral test to the Port Authority's leafleting regulations is inconsistent with this Court's public forum jurisprudence. Review of this aspect of the Court of Appeals decision would clarify that a single standard of review should be applied to all government regulations governing First Amendment activity in a nonpublic forum.[9]

Since this Court decided *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), this Court has consistently relied upon public forum analysis to decide cases in which persons have sought to use government property for expressive activity in violation of rules which restrict or prohibit the activity. *See, United States v. Kokinda*, __ U.S. __, 110 S.Ct. at 3115, 3119 (1990).

In *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), this Court for the first time set forth the public forum doctrine as a comprehensive analytical model for determining the extent to which a government agency must permit expressive activity in a publicly-owned facility. The model differentiated among a traditional public forum, a designated public forum, and a nonpublic forum. *Id.*, at 45-46. Since *Perry*, this Court has consistently applied this model to resolve public forum cases. *See, e.g., United States v. Kokinda, supra*; *Frisby*

[9] The Court is also respectfully requested to note that should this Court grant the Plaintiffs' Petition to review other aspects of the Court of Appeals decision, but not grant this Cross-Petition, such action would not only result in an inequity to the Port Authority, but might also cause lower courts to conclude that it is appropriate to apply different standards of review to different regulations applicable to the same forum, depending on the specific activity at issue. Such a conclusion would be contrary to public forum analysis as set forth by this Court. *See, United States v. Kokinda*, 110 S.Ct. at 3119. See discussion at 17-18, *infra*.

v. Schultz, 487 U.S. 474 (1988); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788 (1985).

Under the *Perry* model, a government may not constitutionally prohibit expressive activity in a traditional public forum or a designated public forum unless the prohibition is necessary to serve a compelling government interest. Time, place and manner regulations may be enforced in a traditional public forum only if the regulations are reasonable, narrowly tailored and leave open alternative means of communication. In contrast, in a nonpublic forum, any reasonable restriction affecting expressive activity that preserves the forum for its "intended purposes" are fully constitutional as long as they do not discriminate against expressions of a particular viewpoint. 460 U.S. at 46, 49.

Specifically as to the issue addressed by this cross-petition, under this Court's forum analysis, a viewpoint-neutral restriction on expressive activity in a nonpublic forum, such as the Port Authority's restriction on the distribution of literature, should be examined *only* for reasonableness. *United States v. Kokinda*, 110 S.Ct. at 3119. "The... decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. at 808 (emphasis in original). The restriction can, therefore, be a prohibition of certain activity in the nonpublic forum:

> "[P]roperty owned or controlled by the government which is *not* a public forum may be subject to a prohibition of speech, leafleting, picketing, or other forms of communication without running afoul of the First Amendment."

> *United States Postal Service v. Council of Greenburgh Civic Assn's*, 453 U.S. 114, 131 n.7 (1981) (emphasis in original).

This Court has applied the viewpoint-neutral/reasonableness test to uphold the authority of the United States Postal Service to prohibit non-mailed literature to be placed in letterboxes (*United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. at 132-33); to uphold the authority of a public school system to prohibit an employee group that was not a recognized collective bargaining entity from using the school mail system (*Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. at 51); to uphold the authority of the federal government to prohibit advocacy organizations from participating in the annual federal employees' charity drive (*Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. at 809-11); and to uphold the authority of a municipal transit system to prohibit political advertising from bus display advertising (*Lehman v. City of Shaker Heights*, 418 U.S. at 304).

Most recently, the viewpoint-neutral/reasonableness test was applied by this Court in *United States v. Kokinda*, *supra*. In *Kokinda*, a plurality of this Court held that a public walkway to a post office was not a public forum, and upheld the prohibition of solicitation from post office walkways as a viewpoint-neutral, reasonable method of promoting pedestrian traffic to and from post offices. 110 S.Ct. at 3122-23.

The Court of Appeals holding in the instant case that the Port Authority regulations restricting leafleting to the exterior portions of its air terminals are unconstitutional is inconsistent with *Perry* and the other public forum decisions of this Court which have declared and applied the "reasonableness" standard.

First, the Port Authority restriction on leafleting satisfies the threshold requirement that it be viewpoint-neutral. *See*, *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. at 806. Indeed, the restriction is not only viewpoint-neutral, but is content-neutral because all leafleting, whatever the religious, political or social content, is treated identically. Any person who wishes to distribute literature or solicit funds at airport terminal property under Port Authority control may do so only on the terminal building sidewalks. *United States v. Kokinda*, 110 S.Ct. at 3124; *Clark v. Community for Creative Non-Violence*, 468 U.S. at 295; *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981).[10]

Second, the Port Authority restriction on leafleting satisfies the requirement that the restriction be reasonable in light of the purpose served by the forum. *United States v. Kokinda*, 110 S.Ct. at 3121; *Cornelius v. NAACP Legal Defense and Educational Fund Inc.*, 473 U.S. at 806. As recognized by both the District Court and the Court of Appeals, the purpose of the Port Authority airports is the facilitation of air travel (A 5, 13, 14, 43, 47).[11] Thus, a prohibition on leafleting in the airport terminals is valid for this reason alone, since, as this Court stated in *Perry*:

> "[W]hen government property is not dedicated to open communication the government may — *without further justification* — restrict use to

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[10] Hereinafter, "ISKCON" in citations will refer to "International Society for Krishna Consciousness, Inc." and similarly named parties.

[11] Although the District Court did not find that the purpose of the airports rendered the air terminals to be nonpublic fora, the District Court did not reject the contention that facilitating air travel *is* the purpose of the airports (A 47).

those who participate in the forum's official business." *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. at 53 (emphasis added, footnote omitted).

Furthermore, it is reasonable for the Port Authority to impose the restriction at issue in furtherance of its legitimate interests in controlling the problems resulting from the distribution of literature at one of "society's chokepoints" (A 14): Increased congestion, safety hazards and litter and the importuning of air travelers. *See, e.g., Heffron v. ISKCON*, 452 U.S. at 653-54; *ISKCON v. Rochford*, 585 F.2d 263, 268-69 (7th Cir. 1978); *International Caucus of Labor Committees v. Metropolitan Dade County*, 724 F. Supp. 917, 927 (S.D. Fla. 1989); *Gannett Satellite Information Network v. Berger*, 716 F. Supp. 140, 150-51 (D.N.J. 1989), *aff'd in part, rev'd in part on other grounds*, 894 F.2d 61 (3d Cir. 1990). As held by the Court of Appeals, the problem of congestion is especially acute at the Port Authority airports:

> "[The] record establishes that pedestrian congestion is one of the greatest problems facing the three [airports]. Much of the facilities in question was built before [the introduction of] wide-body aircraft, and a pressing need for expansion exists." (A 14).

The Court of Appeals' ruling invalidating the Port Authority's restriction on leafleting is erroneous since it is clearly inconsistent with the public forum principle uniformly followed by this Court that a restriction on expressive activity in a nonpublic forum is valid if it is viewpoint-neutral and reasonable in light of the purpose of the forum. As held by this Court:

> "[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government. In *Greer* v *Spock*, *supra*, th[is] Court cited approvingly from its earlier decision in *Adderley* v *Florida*, *supra*, wherein it explained that '"'[t]he State, no less than a private owner of property, has power to preserve property under its control for the use to which it is lawfully dedicated.'"' 424 US, at 836." *United States Postal Service v. Council of Greenburgh Civic Assn's*, 453 U.S. at 129-30 (second square brackets in original, footnote omitted).

It is respectfully submitted that this Court should grant the Cross-Petition for a Writ of Certiorari since the Court of Appeals' invalidation of the Port Authority's restriction upon leafleting casts a shadow over important principles of forum analysis enunciated by this Court. More specifically, the Second Circuit's ruling is inconsistent both with the specific principle of forum analysis that a regulation applicable to a nonpublic forum is valid if it is viewpoint-neutral and reasonable in light of the purpose of the forum, and the larger principle that a government body has the right to preserve property under its control for the site's intended purposes. The granting of this cross-petition and the reversal of the Court of Appeals' judgment invalidating the Port Authority's restrictions on leafleting would remove this shadow.

The error of the Court below in failing to apply the viewpoint-neutral/reasonableness test to the Port Authority's restriction on the distribution of literature has caused at least one lower court to repeat the error. *See*, *Longo v. United States Postal Service*, 761 F. Supp. 220 (D. Conn. 1991). *Longo* concerned the same regulation considered in *Kokinda*, 29 C.F.R. §232.1(h)(1), but a different clause of that regulation. *Kokinda* concerned a clause of 29

C.F.R. §232.1(h)(1) prohibiting the solicitation of contributions on post office premises, and *Longo* concerned a clause prohibiting campaigning for public office. The specific conduct at issue in *Longo* was plaintiff's setting up of a table and chair on a post office walkway to solicit signatures to obtain a place on the ballot for United States Senator. 761 F. Supp. at 223. Following *Kokinda*, the District Court correctly held that the walkway was a nonpublic forum. *Id.*, at 228-29. Despite this holding, the District Court went on to conclude that the prohibition on campaigning was invalid. *Id.*, at 233. Significantly, the District Court reached this conclusion although the District Court did *not* find that the provision did not serve the Postal Service's interests in preventing obstructions to entry, the disruption of postal functions and the entanglement of the Postal Service with partisan politics. *Id.*, at 230-31, 233. Relying on the different treatment of solicitation and leafleting by the Court of Appeals in the instant case, the *Longo* court struck down the campaigning prohibition as unreasonable because the conduct at issue was found to be less intrusive than solicitation of funds and certain conduct *not* prohibited by the Postal Service. *Id.*, at 231-32. Thus, the *Longo* court relied on the Court of Appeals decision below when it failed to apply to the nonpublic forum of the post office walkway the viewpoint-neutral/reasonableness test mandated by the public forum decisions of this Court, *i.e.*, "The . . . decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. at 808 (emphasis in original).

It is especially significant that the Court of Appeals did not consistently apply public forum analysis to the facilities at issue herein. Airports are very specialized, complex facilities that play a vital role in providing transportation to the nation. The safe, efficient and effective management

of the nation's airports is no less significant than the safe, efficient and effective management of the nation's post offices involved in *Kokinda*.

Moreover, the ability of an airport operator to restrict or prohibit leafleting, solicitation and other expressive activity in air terminals is an issue of continuing national importance. Footnote 7 of Plaintiffs' Petition sets forth the great number of reported decisions concerning the efforts of airport operators to regulate such behavior in airport terminals in the exercise of their common obligation to provide safe, efficient and convenient facilities for air travelers. The proliferation and persistence of this category of litigation reflects the continuing desire of airport operators to exercise their legitimate authority over airports with respect to expressive activity as part of their efforts to provide safe, convenient and efficient facilities to air travelers.

Significantly, this Court previously acknowledged the importance of the issue of the extent to which airport operators can control expressive activity when it granted a writ of certiorari in *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1982). Although the *Jews for Jesus* case was resolved on the different issue of the facial validity of a Los Angeles International Airport regulation (*id.*, at 573-4),[12] the issues upon which certiorari

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[12] The Los Angeles International Airport regulation at issue in *Jews for Jesus* provided, *inter alia*, that the Central Terminal Area of the airport "is not open for First Amendment activities by any individual and/or entity". *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569, 570 (1982). This regulation was held to be invalid irrespective of the public forum status of the airport because it was so broad as to prohibit *all* protected expression, including activity that would have no potential adverse effect on congestion or airport functions, such as talking and reading. *Id.*, at 574-75.

(Footnote continued)

was granted were the public forum status of the airport and the effect of that status on the ability of the airport operator to control expressive activity in the airport. *Id.*, at 577 (White J., concurring, joined by the Chief Justice); 55 U.S.L.W. 3197 (1986)(questions raised by petition).[13] The issue of the ability of airport operators to exercise control over expressive activity in their airports continues to be of national importance and warrants review by this Court.

Based on the foregoing, it is respectfully requested that this Court grant this Cross-Petition for a Writ of Certiorari.

The Los Angeles regulation is totally dissimilar to the Port Authority regulations at issue herein. Unlike the Los Angeles provision, the regulations at bar are narrowly drawn and are directed at activities that have impact upon congestion and airport functions, since the repetitive distribution of literature to, and the repetitive solicitation of contributions from, passersby are intended to, and do, distract pedestrians.

[13] "I join the Court's opinion but suggest that it should not be taken as indicating that a majority of the Court considers the Los Angeles International Airport to be a traditional public forum. That issue was one of the questions on which we granted certiorari . . . ." 482 U.S. at 577 (White J., concurring, joined by the Chief Justice).

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered February 8, 1991 insofar as such judgment affirmed the judgment of the United States District Court of the Southern District of New York.

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Respectfully submitted,

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